IN THE HIGH COURT OF JUDICATURE AT BOMBAY

IN APPEAL FROM ITS ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 144 OF 2006

FROM

ORDER ON NOTICE OF MOTION NO. 2875 OF 2004

IN

HIGH COURT SUIT NO. 1071 OF 2005

Dinyar E. Tangri of Bombay Parsi Indian Inhabitant residing at Banoo Manor, Azad Road, Off. M.V. Road, Andheri (E), Mumbai - 400 069	Appellant (Original Defendant no.1)
Versus	
1) Swapna Sadan Co-operative Hsg. Society. Registered under the Maharashtra Co-op. Societies Act, having office at 156 Azad Road, M.V. Road, Andheri(E), Mumbai - 400 069.	Respondent No.1 (Ori.Plaintiff)
2) S.A. Developers, a registered partnership firm, having their office at 'Snehdhara', Jeevan Vikas Kendra Road, S.N. Marg, Andheri (E), Mumbai - 400 069	
3) Akbar Contractor, partner of the 2nd Respondent.	
4) Rahim Contractor Nos. 3 and 4 having their address at 'Snehdhara' J.V. Kendra Road, S.N. Marg, Andheri (E), Mumbai- 400 069	Respondent Nos. 2 to 5 (Orig. Defts. 2 to 5)
5) Brihanmumbai Municipal Corporation, having their Office at Mahapalika Marg, Mumbai - 400 001	

Mr. M.S. Singhvi, Sr. Advocate with Mrs. M.P. Shroff for Appellant.

Mr. M.P. Vashi, Advocate for Respondent No. 1.

Mr. A.G. Damle, Advocate for Respondent Nos. 2 to 4.

Mr. K.N. Gaikwad, Advocate for Respondent No. 5.

CORAM : KSHITIJ R. VYAS, C.J. &
ABHAY S. OKA, J.

DATE : 29TH JUNE, 2006

P.C.

1. By this appeal, the first defendant in a suit filed by the first respondent has taken exception to Judgment and Order dated 30th January, 2006 passed by learned single Judge of this Court in Notice of Motion No. 2875 of 2004 in Suit No. 1071 of 2005. By the impugned Judgment and Order, a Notice of Motion for interim relief taken out by the first Respondent has been made absolute in terms of prayers (a) to (d).

2. With a view to appreciate the submissions made by the learned counsel appearing for the parties, it will be necessary to refer to the facts of the case in brief.

3. The dispute relates to structures on the plot of land bearing City Survey No. 166 of village

Gundavli, Azad Road, Andheri (E), Mumbai - 400 069. There is a multi storied building on the said plot along with a bungalow which is occupied by the appellant. The second respondent (second defendant) is a Partnership Firm and the third and fourth respondents are the Partners of the said Firm. The appellant's mother entered into an agreement in favour of the second to fourth respondents on 29th July, 1988 authorising the said respondents to develope the property by demolishing the existing structures and by constructing new buildings. The second respondent developed the property by constructing a bungalow for the use of the appellant and a multi storied building. The flats and premises in the multi storied building were sold by the second respondent to various purchasers. The first respondent-society is formed by purchasers of flats and premises in the multi storied building constructed on the said plot.

4. The first respondent filed suit No. 1071 of 2004 against the appellant and the second to fourth respondents for a decree directing the second to fourth Respondents and the Appellant to execute a conveyance in respect of the entire plot of land bearing City Survey Nos. 166(a) and 166(b) at village Gundavli, Azad Road, Andheri (East), Mumbai in favour of the Respondent. A decree was prayed for against the second to fourth respondents directing them to sell and dispose off four shops on the ground floor of multi

storied building and till the shops are sold, the said respondents be directed to become Members of the first respondent-Society and to pay arrears of maintenance and outgoings in respect of said four shops to the first respondent. A decree was prayed for directing the appellant to become a Member of the first respondent-society. In the suit there is a challenge to Clauses 6 and 14(b) in agreements executed by second to fourth respondents in favour of the flat purchasers on the ground that Clauses No. 6 and 14(b) are contrary to the express provisions of Law. A declaration was sought that the appellant or the second to fourth respondents have no exclusive right as regards compulsory open spaces kept on the said plot. The first respondent by taking out a notice of motion prayed for following reliefs :

> (a) That pending the hearing and final disposal of the suit, the defendant No. 1, his servants, agents and contractors be restrained by an order and injunction of this Hon'ble Court from claiming exclusive rights in the open compulsory space, more particularly shown in the sketch plan annexed to the plaint situate at Swapna Sadan Co-op. Housing Society Ltd., 166, Azad Road, Off.M.V. Road, Andheri (East), Mumbai- 400 069.
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> (b) That pending the hearing and final

disposal of the suit, the first defendant,his servants, agents and employees be restrained by an order and injunction of this Hon'ble Court from putting up the fencing or the compound wall or iron girders on the North side which amounts to an encroachment on the open land meant for the members of the Society.

(c) That pending the hearing and final disposal of the suit, the first defendant, his family members, servants, agents and employees be prevented by an order and injunction of this Hon'ble Court from causing obstruction to the members of the plaintiffs society from parking the vehicles, or using the said land for recreation purpose, either by oputting up a grill, or wire fencing or in any other manner, or directly or indirectly sub-divide the open land contrary to the provisions of the BMC orders and directions.

(d) That pending the hearing and final disposal of the suit, the defendant no. 1 and defendant Nos. 2 to 4, their servants and agents may be ordered to pay the proportionate society charges and other outgoings for the use of the bungalow by the first defendant and for the use and occupation of the 4 shops by defendant Nos. 2 to 4 in the building of the

plaintiffs society.

(e) That the Sr. Inspector of Police, Andheri Police Station and his subordinates be ordered and directed to assist the plaintiffs for implementing the orders that may be passed by this Hon’ble High Court."

By the impugned order Prayer (a) to (d) have been granted.

5. The contention of the first respondent is that the appellant cannot claim any exclusive right over the open spaces in the property as the second to fourth respondents are under the legal obligation to execute a conveyance in respect of entire plot which is subject matter of the suit in favour of the first Respondent. The contention is that the second to fourth respondents being builders and developers are under the obligation under the provisions of the Maharashtra Ownership Flats Act, 1963 to execute a conveyance in respect of the entire plot with buildings in favour of first respondent society. The contention of the first respondent is that the appellant must become a member of the Society and is liable to pay monthly outgoings and maintenance charges to the first respondent. The notice of motion was contested by the appellant by filing the reply. The contention of the appellant in short is that the rights of the flat purchasers are

subject to the agreement between appellant's mother and second to fourth respondents. The case of the appellant is that the second to fourth respondents have agreed that it is not necessary for appellant to become a member of the first respondent society as the

appellant is the owner of the bungalow in his own right.

6. The learned senior counsel appearing for the appellants submitted that as per the agreement between the appellant and second to fourth respondents, he is under no obligation to become a member of the first respondent society. He submitted that the appellant is entitled to have a separate bill of property taxes in his name in respect of the bungalow and in view of the impugned order, the Municipal Corporation has declined to issue a separate bill in respect of bungalow in the name of the appellant. He submitted that the members of the first respondents who are flat purchasers are under an obligation to abide by the terms and conditions of the agreement between the appellant's mother and second to fourth respondents. He submitted that as per the terms of the said agreement, appellant is not required to contribute any maintenance charges or outgoings to the first resondents. He submitted that the appellant has employed his own Sweeper to keep the area around the bungalow clean and that certain

electric lamps in the open spaces have been installed by the appellant. He submitted that interim relief in terms of prayer clause (d) could not have been granted by the learned single Judge as the Appellant cannot be forced to become a member of the first Respondent society. He submitted that he is not causing obstruction to the members of the first respondent-society in parking their vehicles in the open space in the compound. He further submitted that the appellant has a strong objection for parking cars in the close vicinity of the outer walls of the bungalow as in the past the cars owned by the members of the first respondent have damaged the walls of the bungalow. He submitted that the first respondent has no right to collect maintenance charges and taxes from the appellant. He submitted that by the impugned order the rights of the appellant to enjoy his own property have been affected.

7. The learned counsel appearing for the first respondent supported the impugned Judgment and order. He submitted that the appellant cannot claim any exclusive right over the open spaces in the property and that the appellant cannot put up fencing or compound wall or girders which will amount an encroachment on the open land held by the first respondent. He submitted that the first respondent has installed electric lights in the open spaces and has engaged a sweeper for keeping the open space clean. He

submitted that security arrangements are made by the first Respondent. As the appellant is taking benefit of said facilities, he is bound to pay the maintenance charges, outgoings and taxes to the first Respondent.

8. We have considered the submissions made by the learned counsel appearing for the parties. On the plot in question a multi storied building having residential flats and shops and a bungalow has been constructed. The bungalow is held by the appellant. The first Respondent is a co-operative society formed by the purchaser of flats. It is an admitted position that as of today the plot has not been lawfully sub divided. Prima facie, the agreement between the flat purchasers and second to fourth respondents requires a conveyance to be executed in respect of the entire land in favour of the first respondent. Therefore, the appellant cannot claim exclusive rights in the open spaces more particularly shown in the Sketch annexed to the plaint. To prevent the first respondent from claiming exclusive rights, prayer (a) has been granted.

9. Prayer (b) restrains the appellant from putting up fencing or compound wall or iron girders on the Northen side. The question whether appellant is entitled to exclusive rights to occupy a particular open space will have to be decided at the time of trial. However, prima facie, the appellant has no exclusive right to use open spaces. Prayer (c)

restrains the appellant from causing obstruction to the members of the first respondent-society from parking the vehicles in open spaces and from using the open space for recreation purposes. Prayer (c) does not prevent the appellant from enjoying the bungalow. Prayer (d) does not direct the appellant to become member of the first respondent-society. All that the prayer clause (d) says is that the proportionate Municipal taxes in respect of the bungalow and monthly maintenance in respect of the bungalow will have to be paid by the appellant to the first respondent society. It appears to us that the appellant is using facilities of the first respondent in as much as the first respondent has employed Sweepers for keeping open spaces clean and has engaged a Security services for the security of the property. As a result of prayer clause (d), the first respondent will have to pay the outgoings in respect of the bungalow to the first Respondent. Prayer (d) is naturally subject to final outcome of the proceedings.

10. So far as prayer (d) is concerned, we had suggested to the learned counsel for the appellant that if the appellant is willing to pay society charges and other outgoings in respect of the bungalow to the first Respondent, the Corporation can be directed to issue bills of the municipal taxes in the name of the appellant. After taking instructions, the learned counsel for the appellant stated that the appellant was

not willing to accept the said suggestion.

11. It is very well settled law that interim relief has to be granted in aid of final relief which will be ultimately granted. On the basis of material on record, the learned single Judge has granted interim relief. The order granting interim relief is an equitable and discretionary order. The said order is not shown to be perverse and therefore no interference

is called for with the impugned order which is a discretionary order.

12. In view of the foregoing discussions, appeal is dismissed with no order as to costs.

(KSHITIJ R. VYAS, CHIEF JUSTICE)

(ABHAY S. OKA, J.)